

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF WASHINGTON
4

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 11, 2018

SEAN F. McAVOY, CLERK

5 KARL K.,

6 Plaintiff,

7
8 v.

9 COMMISSIONER OF SOCIAL
10 SECURITY,

11 Defendant.
12

No. 2:17-CV-0304-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

13 **BEFORE THE COURT** are cross-motions for summary judgment. ECF
14 No. 21, 23. Attorney Joseph M. Linehan represents Karl K. (Plaintiff); Special
15 Assistant United States Attorney Jeffrey Eric Staples represents the Commissioner
16 of Social Security (Defendant). The parties have consented to proceed before a
17 magistrate judge. ECF No. 8. After reviewing the administrative record and briefs
18 filed by the parties, the Court **GRANTS** Defendant's Motion for Summary
19 Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

20 **JURISDICTION**

21 On September 13, 2013, Plaintiff protectively filed an application for
22 disability insurance benefits. Tr. 170. On November 26, 2014, Plaintiff also
23 protectively filed an application for supplemental security income. Tr. 178. In
24 both applications, Plaintiff alleged disability since December 31, 2011, due to left
25 shoulder and lower back problems and a torn rotator cuff (right shoulder). Tr. 170,
26 178, 189. Plaintiff's applications were denied initially and upon reconsideration.

27 Administrative Law Judge (ALJ) R. J. Payne held a hearing on February 18,
28 2016, Tr. 40-81, and issued a partially favorable decision on March 9, 2016, Tr.

1 22-31. The ALJ determined that Plaintiff was not disabled prior to February 12,
2 2016, but became disabled on that date and continued to be disabled through the
3 date of the ALJ's decision. Tr. 22. The Appeals Council denied review on June
4 29, 2017. Tr. 1-6. The ALJ's March 2016 decision thus became the final decision
5 of the Commissioner, which is appealable to the district court pursuant to 42
6 U.S.C. § 405(g). Plaintiff filed this action for judicial review on August 28, 2017.
7 ECF No. 1, 4.

8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing transcript, the
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized
11 here.

12 Plaintiff was born on May 12, 1961, and was 50 years old on the alleged
13 onset date, December 31, 2011. Tr. 54, 178. He has a high school education and
14 has primarily worked as a manufacturing and repairs welder. Tr. 53-54, 62, 190.
15 Plaintiff's disability report indicates he stopped working on December 31, 2011,
16 because of his condition(s). Tr. 189. He testified the main thing preventing him
17 from being able to work is left shoulder pain. Tr. 55. Nevertheless, Plaintiff
18 indicated he could lift 10 pounds with his right arm and could lift up to 20 pounds
19 total, but not above waist-level. Tr. 56. His daily activities consisted of taking
20 walks, looking after his friend's cattle, doing a small amount of cleaning and
21 taking care of his personal needs. Tr. 66-67.

22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
25 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
26 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
28 only if it is not supported by substantial evidence or if it is based on legal error.

1 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
2 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
3 1098. Put another way, substantial evidence is such relevant evidence as a
4 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
5 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
6 rational interpretation, the Court may not substitute its judgment for that of the
7 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
8 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
9 administrative findings, or if conflicting evidence supports a finding of either
10 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
11 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
12 supported by substantial evidence will be set aside if the proper legal standards
13 were not applied in weighing the evidence and making the decision. *Browner v.*
14 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

15 **SEQUENTIAL EVALUATION PROCESS**

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
18 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
19 four, the burden of proof rests upon the claimant to establish a prima facie case of
20 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
21 met once a claimant establishes that a physical or mental impairment prevents the
22 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
23 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
24 to step five, and the burden shifts to the Commissioner to show that the claimant
25 can perform other jobs present in significant numbers in the national economy.
26 *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004).
27 If a claimant cannot make an adjustment to other work in the national economy, a
28 finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

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At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since the alleged onset date, December 31, 2011. Tr. 24. At step two, the ALJ determined Plaintiff had the following severe impairments: degenerative joint disease of the bilateral shoulders, status-post surgery 2008; right cubital tunnel syndrome; and right carpal tunnel syndrome. Tr. 24. At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. Tr. 25.

At step four, the ALJ determined Plaintiff could not perform his past relevant work. Tr. 28. At step five, the ALJ found that based on the testimony of the vocational expert, and considering Plaintiff's age, education, work experience and RFC, Plaintiff could perform other jobs present in significant numbers in the national economy prior to May 12, 2016, including the jobs of furniture rental consultant and sales clerk. Tr. 29-30. The ALJ further determined that beginning on May 12, 2016, the date Plaintiff's age category changed to age 55, a finding of "disabled" was reached by direct application of Medical-Vocation Rule (grid rule) 202.06. The ALJ thus concluded Plaintiff was not under a disability within the

1 meaning of the Social Security Act at any time from December 31, 2011, the
2 alleged onset date, through February 12, 2016, but became disabled on that date
3 due to the non-mechanical application of the grid rules and continued to be
4 disabled through the date of the ALJ's decision, March 9, 2016. Tr. 30-31.

5 **ISSUES**

6 The question presented is whether substantial evidence supports the ALJ's
7 decision denying benefits and, if so, whether that decision is based on proper legal
8 standards.

9 Plaintiff contends the ALJ erred in this case by failing to give the
10 appropriate weight to the opinions of Plaintiff's treating and examining doctors¹
11 and his testimony. ECF No. 21 at 1.

12 **DISCUSSION²**

13 **A. Medical Opinion Evidence**

14 Plaintiff asserts the ALJ erred by assigning "little weight" to the opinion of
15 Donald Jackson, PA-C, regarding Plaintiff's physical functional capacity. ECF
16 No. 21 at 5-9.

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18 ¹Plaintiff's briefing fails to actually contest the ALJ's consideration of any
19 doctors' opinions in this case. *See* ECF No. 21 at 5-9. Instead, Plaintiff challenges
20 the ALJ's rationale for according "little weight" to the opinions of Donald Jackson,
21 PA-C. *Id.*

22 ²In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 In a disability proceeding, the courts distinguish among the opinions of three
2 types of acceptable medical sources: treating physicians, physicians who examine
3 but do not treat the claimant (examining physicians) and those who neither
4 examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81
5 F.3d 821, 830 (9th Cir. 1996). A treating physician's opinion carries more weight
6 than an examining physician's opinion, and an examining physician's opinion is
7 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,
8 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. Moreover, the opinion
9 of an acceptable medical source is given more weight than that of an "other
10 source." 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71
11 (9th Cir. 1996). Evidence from "other sources" is any information or statements
12 from a non-medical source about any issue in Plaintiff's claim. 20 C.F.R. §
13 404.1513(a)(4). An ALJ is obligated to provide germane reasons for discounting
14 "other source" statements. *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993).

15 With regard to the weight of the medical evidence pertaining to Plaintiff's
16 physical capacity, Drew Stevick, M.D., a medical consultant at the state level of
17 disability determination, reviewed the record on March 26, 2014, and noted there
18 was insufficient evidence of a medical impairment based on the absence of any
19 medical evidence from December 31, 2011, the alleged onset date, until the date
20 last insured, March 31, 2013. Tr. 27, 92. As correctly stated by the ALJ, there is
21 virtually no record of medical treatment or any medically documented physical
22 abnormality from December 2008 to June 2014. Tr. 27.

23 Harvey Alpern, M.D., testified as a medical expert at the February 18, 2016
24 administrative hearing and was accorded "great weight" by the ALJ. Tr. 27-28,
25 45-52. Plaintiff has not contested the weight accorded to Dr. Alpern. *See*
26 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (the
27 Court will not ordinarily consider matters on appeal that were not specifically and
28 distinctly argued in a party's opening brief).

1 Dr. Alpern indicated Plaintiff had degenerative joint disease in both
2 shoulders, predominantly in the left shoulder, with surgeries in 2008. Tr. 46-47.
3 He further indicated cubital and carpal tunnel syndrome of the right hand/upper
4 extremity was suggested as well as low back pain. Tr. 47-48. He found that
5 Plaintiff could lift 20 pounds occasionally, lift 10 pounds frequently, and sit, stand
6 and walk six hours each in an eight-hour day. Tr. 48. Dr. Alpern opined Plaintiff
7 could not reach overhead with the left upper extremity and could only occasionally
8 push and pull. Tr. 49. Plaintiff was also limited to only occasional fine/gross
9 grasping with the right hand. Tr. 49.

10 Based on Dr. Alpern's testimony, and the medical record as a whole, the
11 ALJ determined Plaintiff had the severe impairments of degenerative joint disease
12 of the bilateral shoulders, right cubital tunnel syndrome, and right carpal tunnel
13 syndrome, Tr. 24, which limited Plaintiff to light exertion level work with certain
14 upper extremity restrictions, Tr. 25. Tr. 27.

15 Physician Assistant Jackson, an "other source," filled out a "Physical
16 Functional Evaluation" form on October 29, 2014. Tr. 282-284. Mr. Jackson
17 assessed low back/sciatica pain and left shoulder derangement and opined that
18 Plaintiff's left shoulder derangement severely limited Plaintiff's ability to walk,
19 lift, carry, handle, push, pull and reach. Tr. 283. Mr. Jackson further found
20 Plaintiff was severely limited overall and unable to meet the demands of even
21 sedentary work. Tr. 284.

22 The ALJ accorded little weight to Mr. Jackson's opinions. Tr. 28. The ALJ
23 indicated Mr. Jackson primarily relied on Plaintiff's self-reported symptoms and
24 complaints and that the evaluation was conducted for the purpose of state welfare
25 assistance, not social security disability. Tr. 28. The ALJ further held that the
26 report was a check-box form with few objective findings in support of the degree
27 of limitation opined. Tr. 28.

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1 As determined by the ALJ, Mr. Jackson provided little objective rationale
2 for his opinion on the form report that Plaintiff was severely limited; therefore, the
3 assessed limitations appear to be predominantly based on Plaintiff's subjective
4 complaints. *See Morgan*, 169 F.3d at 602 (the opinion of a physician premised to a
5 large extent on a claimant's own account of symptoms and limitations may be
6 disregarded where they have been properly discounted). As discussed below, the
7 ALJ's reasons for discounting plaintiff's subjective complaints in this case are
8 supported by the evidence of record and free of error. *See infra*. Moreover, it is
9 proper for an ALJ to discredit a treating physician's opinion that is unsupported by
10 rationale or treatment notes and offers no objective medical findings to support the
11 existence of alleged conditions. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149
12 (9th Cir. 2001); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (stating that the
13 ALJ's rejection of a check-off report that did not contain an explanation of the
14 bases for the conclusions made was permissible). The Court finds that the ALJ
15 provided germane reasons for discounting Mr. Jackson's report.³

17 ³As stated above, the ALJ also indicated he accorded little weight to Mr.
18 Jackson's opinion because the evaluation was conducted for the purpose of state
19 welfare assistance, not social security disability. Tr. 28. "The purpose for which
20 medical reports are obtained does not provide a legitimate basis for rejecting them"
21 unless there is additional evidence demonstrating impropriety, and the ALJ has
22 identified no such evidence. *Lester*, 81 F.3d at 832. The Court finds that Mr.
23 Jackson's opinion should not have been discounted on the basis of the purpose of
24 the exam. However, since the ALJ provided other germane reasons, supported by
25 substantial evidence, for according little weight to the opinions of Mr. Jackson, any
26 error based on the ALJ's finding that Mr. Jackson's examination was accorded
27 little weight because it was conducted for the purpose of state welfare assistance is
28 harmless. *See Johnson v. Shalala*, 60 F.3d 1428, 1436 n.9 (9th Cir. 1995) (an error

1 The record reflects that no medical professional, other than Physician
2 Assistant Jackson, has assessed greater physical limitations than determined by the
3 ALJ in this case. In fact, as noted by the ALJ, Tr. 27, a later examination
4 conducted by Mr. Jackson in June 2015 revealed only moderate pain with overhead
5 and behind the back reaching, Tr. 289. The restriction to less than sedentary work
6 as opined by Mr. Jackson in October 2014 is not supported by the weight of the
7 record evidence. The physical limitations assessed by the ALJ are supported by
8 the weight of the record evidence and are free of error.

9 **B. Plaintiff's Symptom Testimony**

10 Plaintiff also challenges the ALJ's rejection of Plaintiff's symptom
11 testimony. ECF No. 21 at 9-13.

12 It is the province of the ALJ to make credibility determinations. *Andrews*,
13 53 F.3d at 1039. However, the ALJ's findings must be supported by specific
14 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
15 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
16 testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at 1281;
17 *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the ALJ must
18 identify what testimony is not credible and what evidence undermines the
19 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill*, 12 F.3d at 918.

20 In this case, the ALJ found Plaintiff's medically determinable impairments
21 could reasonably be expected to cause the alleged symptoms; however, Plaintiff's
22 statements concerning the intensity, persistence and limiting effects of those
23 symptoms were not entirely credible. Tr. 27.

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25 is harmless when the correction of that error would not alter the result). An ALJ's
26 decision will not be reversed for errors that are harmless. *Burch v. Barnhart*, 400
27 F.3d 676, 679 (9th Cir. 2005) (citing *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th
28 Cir. 1991).

1 The ALJ first indicated Plaintiff's statements of alleged disabling physical
2 impairments and their corresponding symptoms were inconsistent with the
3 objective medical evidence of record. Tr. 27. A lack of supporting objective
4 medical evidence is a factor which may be considered in evaluating an individual's
5 credibility, provided it is not the sole factor. *Bunnell v. Sullivan*, 347 F.2d 341,
6 345 (9th Cir. 1991) (Once a claimant produces objective medical evidence of an
7 underlying impairment, an adjudicator may not reject the claimant's subjective
8 complaints based solely on a lack of objective medical evidence to fully
9 corroborate the alleged severity of pain.); *see also Robbins v. Soc. Sec. Admin.*, 466
10 F3d 880, 883 (9th Cir. 2006) (An ALJ may not make a negative credibility finding
11 "solely because" the claimant's symptom testimony "is not substantiated
12 affirmatively by objective medical evidence.").

13 As stated above, the ALJ correctly reported there is virtually no record of
14 medical treatment or physical abnormality from December 2008 to June 2014. Tr.
15 27. Furthermore, no medical professional, other than Mr. Jackson, has assessed
16 greater physical limitations than determined by the ALJ in this case. The medical
17 evidence of record does not support Plaintiff's allegation of disabling limitations.

18 The ALJ also indicated Plaintiff's activities of daily living were inconsistent
19 with his assertions of totally disabling symptoms. Tr. 27, 28. It is well-established
20 that the nature of daily activities may be considered when evaluating credibility.
21 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). While one does not need to be
22 "utterly incapacitated" to be disabled, *id.*, it was proper for the ALJ to find
23 Plaintiff's reports of activities such as preparing meals daily, doing household
24 chores, going out daily, sometimes driving a car, going grocery shopping,
25 swimming, lifting up to 20 pounds, fishing, and hunting, Tr. 56, 202-206, were

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1 inconsistent with the debilitating limitations he alleged⁴ and thus detracted from
2 his overall credibility. Tr. 28. *See Smith v. Comm’r Soc. Sec. Admin.*, 611
3 Fed.Appx. 897, 900 (9th Cir. 2015) (affirming the ALJ’s adverse credibility
4 determination and noting the ALJ found the claimant’s testimony was contradicted
5 by “her own description of helping with” the “care of children” and household
6 chores); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (affirming the
7 ALJ’s adverse credibility determination and noting that the claimant’s claim of
8 disability was undermined by testimony about her daily activities, such as
9 “attending to the needs of her two young children,” cooking, and shopping); *see*
10 *also Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012) (“Even where [a
11 claimant’s daily] activities suggest some difficulty functioning, they may be
12 grounds for discrediting the claimant’s testimony to the extent that they contradict
13 claims of a totally debilitating impairment.”).

14 The ALJ is responsible for reviewing the evidence and resolving conflicts or
15 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
16 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
17 evidence. *Richardson v. Perales*, 402 U.S. 389, 400 (1971). The Court has a
18 limited role in determining whether the ALJ’s decision is supported by substantial
19 evidence and may not substitute its own judgment for that of the ALJ even if it
20 might justifiably have reached a different result upon *de novo* review. 42 U.S.C. §
21 405(g). After reviewing the record, the Court finds that the ALJ provided clear
22 and convincing reasons, which are fully supported by the record, for discounting
23 Plaintiff’s subjective complaints. Accordingly, the ALJ did not err by finding
24 Plaintiff’s symptom allegations were not entirely credible in this case.

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26 ⁴Plaintiff’s disability function report indicated he was “unable to lift,” was
27 “unable to reach, pull and grab,” and had decreased range of motion and pain. Tr.
28 201.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court finds the
3 ALJ's decision is supported by substantial evidence and free of legal error.

4 Accordingly, **IT IS ORDERED:**

5 1. Defendant's Motion for Summary Judgment, **ECF No. 23**, is
6 **GRANTED.**

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 21**, is **DENIED.**

8 The District Court Executive is directed to file this Order and provide a copy
9 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
10 and the file shall be **CLOSED.**

11 DATED September 11, 2018.



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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE